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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-373

DONALD JONES, *Petitioner,*

versus

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 4, 1979

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The petitioner Donald Jones respectfully prays that a writ of certiorari issue to review the judgment, opinion and order on rehearing of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 20, 1979 and August 6, 1979.

OPINION BELOW

The opinion and order denying rehearing in the Court of Appeals, reported at 597 F.2d 485, appear in the appendix to this brief. The District Court rendered a written opinion on the search and seizure issue. *United States v. Herndon,* 390 F.Supp. 1017 (S.D.Fla. 1975).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 20, 1979. A timely petition for rehearing and timely petition for rehearing *en banc* were denied without opinion on August 6, 1979. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a defendant's motion for new trial on the ground of juror misconduct should be denied, notwithstanding the rule that such misconduct is presumptively prejudicial, because the defendant failed to allege and prove that he acted with due diligence in asserting the misconduct?

2. Whether this Court's decisions in *Michigan v. Tyler,* 436 U.S. 499 (1978) and *Mincey v. Arizona,* 437 U.S. 385 (1978) are retroactive?

STATUTORY PROVISIONS INVOLVED

Fed.R.Crim.P. 33. NEW TRIAL

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within seven days after verdict or finding of guilty or within such further time as the court may fix during the seven-day period.

STATEMENT OF THE CASE AND FACTS

Donald Jones was convicted by a jury of multiple offenses relating to the operation of a whiskey distillery. Three days after the verdict, one of the jurors contacted the trial judge and told him that she had been approached by petitioner's wife and a "a huge black man." (R. 197).[1] The court ordered the U.S. Attorney and an Alcohol, Tobacco and Firearms agent to interview all jurors to determine whether they had been similarly approached. (R. 198).

While the investigation was pending, petitioner moved for leave to interview the jurors. (R. 198). The trial court deferred ruling on the motion until the government completed its investigation. (R. 209).

Although the government's investigation was motivated by evidence that one or more of the jurors had been approached *after* the verdict, that investigation uncovered substantial evidence that someone had attempted to bribe one of the jurors *during* the trial. (R.

[1] "R" refers to the record on appeal in the United States Court of Appeals for the Fifth Circuit. "SR" refers to the supplemental record in that court.

218). It also established that at least one other juror was informed of the attempted bribe during the trial. (R. 219). The court set an immediate hearing "to ascertain whether jurors were improperly contacted, either during or immediately after the trial." (R. 213).

A hearing was held at which the jurors testified under oath. (SR. 1-55). The evidence was uncontradicted. It showed that someone had approached one of the jurors on more than one occasion during the trial and offered her a substantial sum of money to vote "not guilty" for petitioner. It showed that the contacted juror spoke with another juror on more than one occasion during the trial and informed the second juror of the attempted bribe. *There was no evidence that petitioner knew of, or had anything to do with, the attempted bribe.*

Notwithstanding uncontradicted evidence of a bribe attempt, the trial court denied petitioner's motion for new trial. The United States Court of Appeals for the Fifth Circuit affirmed. 597 F.2d 485 (5th Cir. 1979). It recognized the rule of "presumptive prejudice" previously established by this Court:

> It is well established law that an improper communication such as a bribe offer to a juror during the trial raises a presumption of prejudice and that a new trial must be ordered unless the government is able to bear its heavy burden of proving harmlessness. *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L. Ed. 654 *appeal after remand,* 350 U.S. 377, 76 S.Ct. 425, 100 L.Ed. 435 (1956).

Id. at 487. The court refused to apply the rule, however, because petitioner did not prove that he acted with due diligence to discover the bribe attempt prior to the verdict:

> The [petitioner] had the burden of proving that this evidence was in fact newly discovered and that his failure to discover it prior to verdict was not due to his lack of diligence.
>
> * * *
>
> It is true that the evidence does not affirmatively establish the [petitioner's] involvement in the bribe offer. However, our decision is grounded on the total lack of evidence disproving such involvement or knowledge.
>
> * * *
>
> In this case [petitioner] presented no evidence whatever on the issues of his lack of knowledge or his due diligence . . . . All that [petitioner] has ever stated is that no evidence shows that [petitioner] was "connected with" the bribe offer. Thus [petitioner] never satisfied his burden of proof as movant and the *Remmer* presumption does not come into play.

Id. at 488, 489, n.4.

The government never asserted in the trial court or on appeal that petitioner's motion for new trial should be denied because petitioner failed to show that he acted with due diligence in discovering the bribe attempt. The

point was simply never an issue at the trial court's evidentiary hearing. On rehearing, petitioner moved the Fifth Circuit to remand the case to the trial court to afford petitioner an opportunity to prove that he acted with due diligence.[2] The Fifth Circuit denied the motion.

Petitioner had also filed a pretrial motion to suppress evidence seized on the premises. The facts are accurately detailed in the trial court's opinion. *United States v. Herndon,* 390 F.Supp. 1017 (S.D.Fla. 1975). The search and seizure began when state officers received an anonymous phone call reporting a shooting on the premises. They arrived at the farm and searched the house and barn for anyone involved in or injured by the shooting. Their search was cursory. They found nothing in the house. They saw an apparatus in the barn which they could not identify. They secured both the house and barn.

They called another state officer who arrived and searched the barn again. He identified the apparatus in the barn as a still. He summoned federal agents.

The federal agents performed a comprehensive search of the house and barn. They searched the entire house and inspected the contents of drawers and closets. They seized numerous items which were the subject of the motion to suppress.

The officers admitted that the area was secure after the initial search for victims of the shooting. Both the

[2]Petitioner attached to the motion his affidavit showing due diligence.

second state officer and the federal agents admitted that they had ample time and opportunity to obtain a warrant. But they did not obtain one. The trial court specifically rejected the government's argument

> that there was insufficient time for the ATF agents to obtain a warrant. In fact the evidence established that the ATF agents were called by the county officers at about 9:00 P.M., and that the magistrate could be reached until about 11:00 P.M. and was located only fifteen or twenty miles away. Furthermore, Federal Agent Harmon testified that the stills each weighed about 2800 pounds, and that he was not afraid that someone would walk away with a still. As for the smaller items in the house, the county police had surrounded the area. Therefore, *no emergency existed concerning the speed with which the federal agents arrived on the scene.*

390 F.Supp. at 1020-21. The trial court nevertheless held that the federal search was valid. It held that any right of privacy had been eliminated by the previous state search:

> The rationale which justified the federal search is that the subsequent intrusion does not significantly increase a pre-existing legitimate interference with a protected interest.

390 F.Supp. at 1021. The fourth amendment was designed to prevent unauthorized invasions of privacy. Based upon *United States v. Green,* 474 F.2d 1385 (5th Cir. 1973), the trial court reasoned that

> once that privacy is lawfully invaded, a subsequent search of the area already searched constitutes no additional invasion of privacy and therefore no violation of the Fourth Amendment.

390 F.Supp. at 1021. It concluded that the federal search without a warrant was proper because

> the federal authorities entered the premises pursuant to a call by the local authorities, and the search conducted by the federal agents was directly related to the objects discovered by the county officers.

390 F.Supp. at 1022.

The trial court's decision was entered before this Court's recent decisions in *Michigan v. Tyler,* 436 U.S. 385 (1978) and *Mincey v. Arizona,* 437 U.S. 385 (1978), which specifically reject the trial court's rationale. The Fifth Circuit refused to consider petitioner's claim that the trial court's decision was contrary to *Tyler* and *Mincey*. It concluded that *Tyler* and *Mincey* should not be applied retroactively. Instead, the "prevailing law" of the circuit, as stated in *United States v. Green,* 474 F.2d 1385 (5th Cir. 1973), should control.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With This Court's Decision In *Remmer v. United States,* 347 U.S. 227 (1954), *appeal after remand,* 350 U.S. 377 (1956) And With The Court Of Appeals Decision In *Marshall v. United States,* 436 F.2d 155 (D.C.Cir. 1971).

In *Remmer v. United States,* 347 U.S. 227 (1954), *appeal after remand,* 350 U.S. 377 (1956), this Court recognized the fundamental importance of a fair and impartial jury when it concluded that evidence of jury tampering raises a "presumption of prejudice" which entitles the defendant to a new trial unless overcome by the government's affirmative proof of harmlessness.

> The presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

347 U.S. at 229. The Fifth Circuit recognized this presumption and the burden it places on the government, 597 F.2d at 487, but nevertheless proceeded to emasculate it by creating a "due diligence" requirement which shifted the burden of proof to the defendant.

The Fifth Circuit's newly created rule has a striking effect when viewed against the facts of this case. Once the government's investigation showed evidence of juror misconduct, the trial court ordered an evidentiary hearing "to ascertain whether jurors were improperly contac-

ted." (R. 213). The hearing which followed established precisely that. A juror had been bribed and at least one other juror had been aware of the bribe. There was no evidence that petitioner knew about the bribe or was involved in it. Neither the trial court nor the government at any time suggested that petitioner was required to prove "due diligence" at this hearing.

Application of *Remmer* mandated that petitioner was entitled to a new trial unless the government could prove that the bribe attempt was harmless. In fact, harmlessness was the only argument made by the government on appeal. But the Fifth Circuit never reached that issue. Instead, it concluded that petitioner had failed to meet the burden of proving "due diligence," a burden which was never placed on him before. The Fifth Circuit concluded that the absence of such evidence meant that the presumption of prejudice never arose. Under *Remmer,* it should have meant that the presumption of prejudice was never rebutted.

In *Remmer,* this Court held that the defendant was entitled to a new trial where someone approached a juror during trial and indirectly suggested the possibility of a bribe. When the defendant first filed his motion, the trial court denied it without holding an evidentiary hearing. The court of appeals affirmed on the ground that the trial court did not abuse its discretion. This Court reversed. It held that the improper contact was presumptively prejudicial. The defendant was entitled to a new trial unless the government could overcome the presumption. 347 U.S. at 229. It remanded the case to the trial court for an evidentiary hearing on the prejudice issue.

On remand, the trial court held that there was no prejudice. This Court again reversed. It concluded that there was no evidence to overcome the presumption of prejudice. 350 U.S. at 381. This Court held that the defendant was entitled to a new trial.

Remmer mandated reversal of this case for a new trial. Yet the Fifth Circuit circumvented *Remmer* and the burden of proof it imposed on the government. It viewed the appeal as one from a motion for new trial based on newly discovered evidence, although petitioner appealed the final judgment.

The Fifth Circuit held that petitioner had the burden of proving that the evidence of jury tampering was newly discovered and that failure to discover it prior to verdict was not due to his lack of diligence. 597 F.2d at 488-89. Yet the court also stated:

> It is true that the evidence does not affirmatively establish the appellant's involvement in the bribe offer. However, *our decision is grounded on the total lack of evidence disproving such involvement or knowledge.*

597 F.2d at 489, n.4.

Proving "due diligence" is no different than proving "harmfulness." Evidence that the defendant knew about the bribe attempt before the verdict but chose to do nothing would establish lack of due diligence. But such proof would also establish harmlessness, because the error would have been invited by the defendant. Under *Remmer,* however, that burden rests on the government, not the defendant. The fact that the government's

burden might be heavy[3] is no justification for shifting that burden back to the defendant under the guise of "due diligence."

The Fifth Circuit incorrectly applied the due diligence standard for another reason. The bribe attempt infringed petitioner's sixth amendment right to a fair and impartial jury. The due diligence standard does not apply to a newly discovered evidence claim of constitutional magnitude. *Marshall v. United States,* 436 F.2d 155 (D.C.Cir. 1971). In *Marshall,* the court of appeals reversed the trial court's holding that the defendant had to prove due diligence before he could obtain a new trial based on newly discovered evidence that the lineup in which he was identified was unconstitutional.

> The fault with the ruling of the trial court here is that appellant, if he has anything to complain about on this point, can complain that his constitutional right to due process under the Fifth Amendment has been denied him. Such alleged infringement of his constitutional rights could be raised by a collateral attack at any time subsequent to the conviction becoming final. If appellant can attack his conviction collaterally, his counsel's lack of diligence at time of trial should be no barrier to considering a motion for a new trial on the merits of the constitutional grounds raised.
>
> * * *
>
> Thus we are of the view that the "due diligence" standard which ordinarily governs disposition of motions for a new trial based on allegedly newly discovered evidence . . . should not apply when the new evidence raises issues which challenge the constitutional validity of the conviction. Cf. the standard established by Fed.R.Crim.P. 52(a) for disregarding ordinary trial errors as "harmless" as contrasted with the higher standard which the Supreme Court in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) has held must be applied in judging the harmlessness of constitutional error.

436 F.2d at 158-59. *Marshall* was later recognized by the Fifth Circuit. *United States v. Shelton,* 588 F.2d 1242, 1250 (5th Cir. 1978). Yet the Fifth Circuit ignored it here.

The Fifth Circuit's circumvention of the presumption and burden of proof required by *Remmer* is also ap-

[3]The Fifth Circuit apparently feared that the government might never be able to meet its burden:

> The burden of proving harmlessness placed on the Government by *Remmer* is difficult to bear. If all that need be shown by a defendant is the existence of tampering, an unscrupulous defendant could purposefully subvert the administration of justice by initiating such bribery attempts.

597 F.2d at 489. But here the government did not adduce any evidence whatsoever indicating that petitioner initiated the bribery attempt. Obviously, such proof by the government might be a basis for refusing to invoke the *Remmer* presumption. However, the possibility that some defendant *might* initiate a bribe attempt is an insufficient justification for denying to all defendants a fair and impartial jury which the *Remmer* presumption seeks to insure.

parent in light of the well-established line of decisions which hold that on appeal from final judgment, improper juror contacts constitute plain error which will be noticed by the court on its own initiative. *United States v. United States Gypsum Company,* 438 U.S. 422 (1978) (ex parte meeting between judge and juror warranted new trial although point not argued in trial court, in court of appeals or in supreme court briefs); *Rogers v. United States,* 422 U.S. 35 (1975) (court's instruction to jury in absence of counsel plain error).

Petitioner appealed from the final judgment.[4] He brought the issue to the trial court's attention before the notice of appeal was filed. He raised the issue on appeal. In *Rogers* and *United States Gypsum,* this Court found fundamental error warranting a new trial. *United States Gypsum* was a civil case in which the issue was not raised until oral argument. Yet this Court found plain error requiring a new trial.

This Court's opinion in *Remmer* was clear. Where there is evidence of improper juror contact, the government has the burden of overcoming the presumption of prejudice by proving that the contact was harmless. That rule cannot be circumvented by imposing an initial burden on the defendant to prove that he could not

[4]Petitioner appealed from the final judgment and conviction, not the motion for new trial. An appeal from an out-of-time motion for new trial is no substitute for an appeal from final judgment. *Edwards v. Cook,* 566 F.2d 960 (5th Cir. 1978); *Burnside v. Eastern Airlines, Inc.,* 519 F.2d 1127 (5th Cir. 1975). Conversely, the presentation of an ore tenus motion for new trial 19 days after verdict cannot deprive petitioner of his right to a plenary appeal of the final judgment which is governed squarely by *Remmer* and *United States Gypsum.*

have discovered the impropriety before verdict. Fundamental constitutional error is not subject to the rule of due diligence. The conflict between the *Jones* decision and the *Remmer* and *Marshall* decisions justifies the grant of certiorari to review the judgment below.

2. The Fifth Circuit Incorrectly Held That This Court's Decisions In *Michigan v. Tyler,* 436 U.S. 499 (1978) And *Mincey v. Arizona,* 437 U.S. 385 (1978) Are Not Retroactive.

The search and seizure which were the subjects of petitioner's motion to suppress occurred on April 12, 1974. This Court decided two cases in 1978 which squarely govern the propriety of the search and seizure. *Michigan v. Tyler,* 436 U.S. 499 (1978); *Mincey v. Arizona,* 437 U.S. 385 (1978). The Fifth Circuit misapplied this Court's decision in *United States v. Peltier,* 422 U.S. 531 (1975) in determining that *Mincey* and *Tyler* were not retroactive.

In *Peltier,* this Court determined that its decision in *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973) should not apply retroactively. However this Court carefully pointed out that it so ruled because *Almeida-Sanchez* was a clear departure from existing statutory and case law and law enforcement officers had a right to rely on that prior law:

> The Border Patrol agents who stopped and searched respondent's automobile were acting pursuant to §287(a)(3) of the Immigration and Nationality Act of 1952 . . .

> Between 1952 and *Almeida-Sanchez*, roving Border Patrol searches under §287(a)(3) were upheld repeatedly against constitutional attack . . . .
>
> It was in reliance upon a validly enacted statute, supported by long-standing administrative regulations and continuous judicial approval, that border patrol agents stopped and searched respondent's automobile. Since the parties acknowledge that *Almeida-Sanchez* was the first roving Border Patrol case to be decided by this Court, . . . we cannot regard as blameworthy those parties who conform their conduct to the *prevailing statutory or constitutional norm*.

422 U.S. at 540-41 (footnotes omitted).

Almeida-Sanchez was this Court's first roving border patrol case and was contrary to the "prevailing statutory or constitutional norm." This Court therefore concluded that the decision should not affect searches conducted pursuant to that norm. *Mincey* and *Tyler*, however, were not the first cases to deal with exigent circumstances and the right of privacy. They were not contrary to the prevailing constitutional norm. Rather, they were fully in accord with the norm which existed not only when they were decided, but also when the searches in this case were conducted. There is no issue of retroactivity because *Mincey* and *Tyler* did not create any new constitutional principle.

In *Mincey* and *Tyler*, this Court held that once the exigent circumstances which justify the initial intrusion into defendant's premises disappear, law enforcement officers cannot search any further in the absence of a warrant. In *Mincey*, this Court rejected the argument, relied on by district court and the government here, that the initial police intrusion into a building justified by an emergency eliminated any right of privacy in the premises and justified a subsequent warrantless search.

> It is one thing to say that one who is legally taken into police custody has a lessened right of privacy in his person. [citations omitted]. It is quite another to argue that he also has a lessened right of privacy in his entire house.

437 U.S. at 391. This conclusion was not based on any new constitutional principle. It was well-settled law from this Court's prior decisions.

> Indeed this very argument was rejected when it was advanced to support a warrantless search of a dwelling where a search occurred as "incident" to the arrest of its occupant. *Chimel v. California,* 395 U.S. 753, 766 n.12, 89 S.Ct. 2034, 2042, 23 L.Ed.2d 685.

Id. Chimel was decided in 1969, four years before the search in this case. This Court was explicit in *Chimel*:

> [W]e can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically

be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require.

395 U.S. at 766, n.12.

This Court also held in *Mincey* that the warrantless first search had to be circumscribed by the emergency which initially justified it. Once the emergency ended, any further search required a warrant. Again, this holding merely reiterated this Court's prior decision in *Terry v. Ohio*, 392 U.S. 1 (1968). *Mincey*, *supra*, 437 U.S. at 390. As this Court stated in *Terry*:

> A search for weapons in the absence of probable cause to arrest, however, must, *like any other search*, be strictly circumscribed by the exigencies which justify its initiation. [citations omitted].

392 U.S. at 25-26 (emphasis added).

The Fifth Circuit itself has not consistently dealt with the retroactivity issue. It has applied *Peltier* in the same manner which petitioner urged in this case. *United States v. Martinez*, 526 F.2d 954 (5th Cir. 1976) (opinion on rehearing *en banc*). In *Martinez*, a search took place subsequent to *Almeida-Sanchez* but before the decisions in *United States v. Ortiz*, 419 U.S. 824 (1975) and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). The government contended that *Ortiz* and *Brignoni-Ponce* could not be considered in determining the validity of the search. The Fifth Circuit rejected that contention.

> Here then we have a search post *Almeida-Sanchez* and pre-*Ortiz*. The government argues that the extension of the rule announced in *Almeida-Sanchez*, applied to checkpoint searches for the first time in *Ortiz*, should not be given retrospective application. We disagree. *Ortiz* did not establish a new rule in an *overruling decision*. See *United States v. Peltier*, 1975, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374; *United States v. Miller*, 5 Cir. 1974, 492 F.2d 37, 40. On the contrary the Court took pains to point out that it was following *Chambers v. Maroney*, 1970, 339 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 419, and *Almeida-Sanchez*.

526 F.2d at 955 (emphasis by court). The court also rejected the argument that *Brignoni-Ponce* should not be considered retrospectively because

> *Brignoni-Ponce* did not establish a new rule in an overruling decision, *Miller*, *supra*, or a new constitutional principle, *Peltier*, *supra*.

526 F.2d at 956.

In *Mincey*, as in *Ortiz*, this Court carefully pointed out that it was following established law. It did not establish a new constitutional principle or an overruling decision. The limited nature of exigent circumstances which justify a warrantless search was spelled out in *Terry* in 1968. The effect of a limited intrusion on a person's right to privacy was spelled out in *Chimel*. *Terry* and *Chimel* established the parameters of the officers'

conduct at the time of the search in this case. The justification advanced in *Peltier* for denying retrospective application of *Almeida-Sanchez* simply does not apply to *Mincey*.

The Fifth Circuit's refusal to apply *Mincey* and *Tyler* means that every time this Court applies one of its earlier search and seizure decisions to a different set of facts that application has no effect on searches conducted prior to it. In *Peltier*, this Court criticized Justice Brennan's dissent in which he stated that "the first duty of a court will be to deny the accused's motion to suppress if he cannot cite a case invalidating a search or seizure on identical facts." 422 U.S. at 542, n.13. Yet that is precisely what the Fifth Circuit did here. *Terry* and *Chimel* required suppression of the evidence by the trial court. *Mincey's* application of *Terry* and *Chimel* required suppression by the Fifth Circuit. The facts of *Terry* and *Chimel* were not identical to this case. The application of those cases to identical facts occurred after the search. Yet the Fifth Circuit applied the retroactivity concept.

Peltier did not intend such a result. Once this Court proscribes a certain type of conduct, the government should not need additional case law on each fact situation to which that rule of law could be applied before the government agents "have notice" of the law. That would eliminate the deterrent effect of the exclusionary rule. *Compare Peltier*, *supra*, 422 U.S. at 538-39. The Fifth Circuit's distortion of this Court's decision in *Peltier* justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment, opinion and order on rehearing of the Fifth Circuit.

Respectfully submitted,

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September 4, 1979

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Donald E. JONES,
Defendant-Appellant.

No. 78-5509.

United States Court of Appeals,
Fifth Circuit.

June 20, 1979.

Appeal from the United States District Court for the Southern District of Florida.

Before AINSWORTH and VANCE, Circuit Judges, and BOOTLE,* District Judge.

BOOTLE, District Judge:

Convicted by a jury of multiple offenses relating to the operation of an illegal whiskey distillery and not challenging the sufficiency of the evidence, appellant urges two grounds for reversal: first, alleged error in denying his motion for new trial upon his showing that someone attempted to bribe a juror during trial and, second, alleged error in denying his motion to suppress

*District Judge of the Middle District of Georgia, sitting by designation.

evidence seized in a search made without a search warrant. For reasons following we affirm.

On August 1, 1975 a jury convicted the appellant, Donald E. Jones, on five counts of a seven count indictment arising out of his participation in the operation of an illegal whiskey distillery. The district court dismissed one count as duplicative of other counts and the jury acquitted appellant on one count. Appellant failed to appear for a hearing and sentencing on August 20, 1975 and was not apprehended until almost three years later. He was finally sentenced on June 23, 1978 and now appeals his conviction.

I. Jury Tampering

Two days after the verdict, one of the jurors was contacted by appellant's wife, Debra Jones, and "a huge black man" who was later identified as Willie Lucas. Lucas solicited this juror's agreement that appellant had been "shanghaied" and refused to tell her how her address had been found. This juror, being upset, contacted the trial judge who on August 4, 1975 entered an order directing an investigation by the United States Attorney's office and the Bureau of Alcohol, Tobacco and Firearms. The court directed that all statements taken during the investigation be filed with the Clerk as part of the record. The positive identification of Willie Lucas as the "huge black man" is supplied in a report of an interview with Lucas so filed.

On August 5, 1975, appellant submitted a motion to interview jurors pursuant to a local rule and filed in support thereof an affidavit dated August 4, 1975 by the same Willie Lucas which detailed post-verdict state-

ments made by another juror, Arlie Crooms. Ms. Crooms was quoted as saying to him that she did not feel that the right verdict was given, that there was no proof that appellant owned the stills, and that she voted guilty only because of pressure from other jurors and her illness during the deliberations.

During the court ordered investigation, ATF agents interviewed all the jurors concerning possible approaches. When they interviewed Ms. Reboso, one of these jurors, they were told that juror Arlie Crooms had told her during the trial that she had been offered $1000 by someone to vote for acquittal. Subsequently, Ms. Crooms was interviewed and denied any improper approach. She later recanted and informed the ATF of a bribe offer by Willie Lucas who asked that she vote to acquit appellant.

The district court ordered a hearing on the matter for August 20, 1975. At the hearing, Ms. Crooms, Ms. Reboso, and the juror who was subjected to a post-verdict approach all testified. They were questioned by the Government attorney and by counsel for a co-defendant, B. J. Herndon, but no questions were asked by appellant's counsel. In fact, no evidence at all was submitted on behalf of appellant. The district court was informed that the Marshal had been unable to serve a subpoena on Willie Lucas and that the Marshal had been told that Lucas had decided to go to Nassau until August 24th. As stated previously, appellant also failed to appear and participate in this hearing despite the fact that by order of August 12, 1975 the district court had commanded his presence and despite the fact that at 10:30 A.M. on the morning of the hearing appellant and

his wife were in his attorney's office at which time his attorney cautioned him to be present for the hearing at 1:00 P.M. The only explanation of his absence was made by his attorney as follows: "I spoke to Mrs. Debra Jones. She said that she left Donald a while ago and he was on his way down here. They came in separate cars. She made it; I don't know why he didn't make it." As above indicated, appellant's wife Debra (with separate counsel) was present at the hearing and, despite her participation in the post-verdict approach to a juror, was not called by appellant's counsel or by anyone as a witness. At the conclusion of the testimony, appellant's counsel made a motion which in substance was a motion for a new trial[1] and the district court denied it.

It is well established law that an improper communication such as a bribe offer to a juror during the trial raises a presumption of prejudice and that a new

[1]Appellant's motion is quoted in full below:

> I would like to make a Motion at this time on behalf of Mr. Donald Jones that based upon the testimony adduced here from the juror, Mrs. Crooms, and which is corroborated by Mrs. Reboso, and whom Mrs. Crooms corroborates, the fact that Mrs. Reboso had made mention she knew a particular witness and the fact that for two days, apparently, Mrs. Reboso had known the name of one of the defendants, and Mrs. Crooms said that she had reached a verdict, apparently not by choice but by what she says was the — either the other understanding of Mrs. Reboso or some of the other jurors, that she would have to come back and she wasn't feeling well, and that she reached a verdict that did indicate what she felt to be her verdict; she did it because of compliance with other jurors, so on that basis and on the testimony adduced, I would make a motion on behalf of Don Jones to set aside the verdict as returned by this jury.

trial must be ordered unless the Government is able to bear its heavy burden of proving harmlessness. *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), *appeal after remand,* 350 U.S. 377, 76 S.Ct. 425, 100 L.Ed. 435 (1956). Both appellant and the Government have concentrated their efforts primarily on the question of harmlessness raised in *Remmer.* The Government has asserted that both jurors, Ms. Reboso and Ms. Crooms showed by their testimony that the bribe offer had no effect on their deliberation.[2] Appellant insists that harmlessness was not shown. Both sides have overlooked some fundamental issues inherent in the procedural context in which appellant's motion was made. Since these questions are controlling, this court need not reach the issue of harmlessness.

The jury's verdict was returned August 1, 1975. A timely motion for new trial was filed on August 8, 1975 and overruled on August 12, 1975. Appellant's motion which is the subject of this appeal was not made until August 20, 1975. After seven days from the date of the verdict, a motion for new trial cannot be entertained unless it is based on newly discovered evidence. Fed.R.Cr.P. 33. Appellant's motion was thus one which would have to be founded upon allegedly newly dis-

[2]Juror Crooms testified: "I didn't say anything to her (referring to Juror Reboso) because after she didn't call me, I didn't say anything to her because I had decided to forget about it." (Supp. R. 19). Juror Reboso testified: "I didn't think of it at all. I was having personal problems which were more important to me at the time. I sort of heard her and it went in one ear and out the other because my problems were major problems. I mean, I am being as sincere as I can be." (Supp. R. 38). In addition Juror Crooms argued for appellant's acquittal during jury deliberations and the jury did in fact acquit him of one count.

covered evidence of an improper communication to a juror. This court and the Court of Appeals for the Sixth Circuit have recognized the propriety of categorizing such a motion as one for a new trial based upon newly discovered evidence. *Richardson v. United States*, 360 F.2d 366 (5th Cir. 1966); *Zachary v. United States*, 275 F.2d 793 (6th Cir. 1960). Both the Government and appellant have treated the issues in this case without recognizing the requirements and burdens placed on a defendant presenting such a motion.

In most new trial motions based on newly discovered evidence, the proffered evidence goes directly to proof of guilt or innocence. In such a motion the movant has a burden of showing (1) that the evidence was in fact discovered after the verdict, (2) that the movant's failure to learn of this evidence was not due to any lack of diligence on his part, (3) that the evidence is material and not merely cumulative or impeaching, and (4) that a new trial would probably result in an acquittal. *United States v. Bryant*, 563 F.2d 1227 (5th Cir. 1977); *United States v. Rachal*, 473 F.2d 1338 (5th Cir. 1973); *United States v. Hagerty*, 561 F.2d 1197 (5th Cir. 1977); *United States v. Schwartzenbaum*, 527 F.2d 249 (2d Cir. 1975); *United States v. Ellison*, 557 F.2d 128 (7th Cir. 1977). Admittedly, there are major distinctions in the substance of the evidence proffered by the appellant and that proffered in the above cited cases since appellant's evidence goes to the fairness of the trial rather than to the usual question of guilt or innocence. Regardless of those distinctions a motion for a new trial can not be based on newly discovered evidence unless that evidence is in fact unknown to the movant until after the verdict. The appellant had the burden of proving that this evidence was in fact newly discovered and that his

failure to discover it prior to verdict was not due to his lack of diligence.[3] *Zachary v. United States, supra; see United States v. Ellison, supra*. It deserves note that in *Remmer*, it was established, by the Government's failure to deny, that "[n]either the judge nor the prosecutors informed the petitioner of the incident, and he and his counsel first learned of the matter by reading of it in the newspapers after the verdict." 347 U.S. at 228, 74 S.Ct. at 451, 98 L.Ed. at 655. Such a burden is eminently reasonable in view of the devastation which jury tampering could bring to our country's highly valued jury system. The burden of proving harmlessness placed on the Government by *Remmer* is difficult to bear. If all that need be shown by a defendant is the existence of tampering, an unscrupulous defendant could purposefully subvert the administration of justice by initiating such bribery attempts.

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[3]Another line of cases forcefully shows the relevance of a defendant's knowledge or lack of knowledge before the verdict of jury tampering. These cases teach that a defendant cannot learn of juror misconduct during the trial, gamble on a favorable verdict by remaining silent, and then complain in a post-verdict motion that the verdict was prejudicially influenced by that misconduct. *Oakes v. Howard*, 473 F.2d 672 (6th Cir. 1973); *United States v. Brumbaugh*, 471 F.2d 1128, 1130 (6th Cir. 1973) (McCree, J., concurring); *United States v. Carter*, 433 F.2d 874 (10th Cir. 1970); *Hall v. United States*, 396 F.2d 428 (10th Cir. 1968); *United States v. Coduto*, 284 F.2d 464 (7th Cir. 1960). The rule requiring a showing that the evidence of jury tampering is newly discovered and the rule of waiver established by the above cited cases are not aimed necessarily at discovering a defendant's complicity in the improper communication to the jury. The policies behind both rules fully encompass any knowledge possessed by the defendant before the verdict whether it be innocent or not. Such knowledge should be disclosed to the trial judge before the verdict so that an attempt can be made to salvage the trial by ridding the jury of prejudicial influences.

In this case appellant presented no evidence whatever on the issues of his lack of knowledge or his due diligence. In fact, his counsel did not even disclaim such knowledge on behalf of appellant. All that appellant has ever stated is that no evidence shows that appellant was "connected with" the bribe offer.[4] Thus appellant never satisfied his burden of proof as movant and the *Remmer* presumption does not come into play. The district court was correct in denying appellant's motion for new trial.

II. Motion to Suppress

Appellant's other contention is that the district court should have suppressed evidence seized by ATF agents during a search conducted without a warrant. On April 12, 1974, local police officers responded to a reported shooting at the premises leased by appellant. During their search for suspects or injured persons, these officers discovered appellant's illegal stills and other related paraphernalia. These local officers then called in ATF agents who seized certain evidence. This court agrees with the district court's conclusion[5] that the ATF agents' conduct was proper under the doctrine of *United States v. Green*, 474 F.2d 1385 (5th Cir. 1973) which was the then prevailing law of this circuit. *See, United States v. Brand*, 556 F.2d 1312 (5th Cir. 1977).

Appellant contends that two recent Supreme Court cases, *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978), and *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), invalidate *Green* and require that the evidence seized in the instant search be excluded. We conclude that *Tyler* and *Mincey* should not be applied retroactively on the facts of this case. *United States v. Peltier*, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975); *United States v. Montgomery*, 558 F.2d 311 (5th Cir. 1977).

AFFIRMED.

[4] It is true that the evidence does not affirmatively establish the appellant's involvement in the bribe offer. However, our decision is grounded on the total lack of evidence disproving such involvement or knowledge. Though not a basis for our decision, it is interesting to note that the circumstances that are shown by the record tend to show rather than negate such knowledge or involvement. Willie Lucas, who offered the bribe, accompanied appellant's wife two days after the verdict in an attempt to solicit a juror to impeach the verdict. In furtherance of this endeavor, Lucas submitted an affidavit as support for appellant's motion to interview jurors. Events that came to light at trial also raise questions. It is clear that Debra Jones and a Government witness, with appellant's knowledge, negotiated an agreement to pay said witness a large sum if he would not testify. The witness claims that appellant offered a bribe; appellant describes these events as an extortion attempt by the witness. Unfortunately, we have no way of knowing what the jury thought of these contacts.

[5] *United States v. Herndon*, 390 F.Supp. 1017 (S.D.Fla. 1975).

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
August 6, 1979

TO ALL PARTIES LISTED BELOW:

NO. 78-5509 — U.S.A. v. DONALD E. JONES

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By/s/Sally Hayward
Deputy Clerk

cc: Mr. Neal R. Sonnett
Mr. Marc Cooper
Mr. Bruce A. Zimet

UNITED STATES of America

v.

Bobby J. HERNDON et al.,
Defendants.

No. 74-549-Cr-CF.

United States District Court,
S.D. Florida.
Feb. 20, 1975.

William Northcutt, Asst. U.S. Atty., Miami, Fla., for the United States.

Bernstein & Robrish, Miami, Fla. for defendant Bobby J. Herndon.

Max P. Engel, Miami, Fla., for defendant Donald E. Jones.

Louis Stoskopf, Miami, Fla., for defendant Thomas E. Jones.

ORDER

FULTON, Chief Judge.

In an Indictment filed on September 25, 1974, the defendants were charged with the illegal operation of a still located at Barn No. 4, 19955 S.W. 248th Street, Dade County, Miami, Florida, in violation of 26 U.S.C. §§5601(a)(1), (2), (4), (8), 5602, 5604, and 18 U.S.C. §371. On November 12, 1974, defendants Herndon,

Donald Jones and Thomas Jones filed a motion to suppress various equipment, supplies and miscellaneous items useable in the manufacture of whiskey which were seized on April 12, 1974 during a search of the barn, the house, several vehicles, and the person of Thomas Jones in the vicinity of 19955 S.W. 248th Street, Miami, Florida. Defendants contend that the search constituted a violation of the Fourth Amendment of the United States Constitution in that it was made without a search warrant and not incident to a lawful arrest. The government argues that the search was justified due to exigent circumstances. The government concedes that the defendants all have standing to bring this motion to suppress: Thomas Jones was on the premises when the search took place; Donald Jones was renting the premises; and Bobby Joe Herndon was living on the premises.

On December 13, 1974, the Court held an evidentiary hearing on defendants' motion. Testimony presented at the hearing established that on Friday, April 12, 1974, at 7:31 P.M. the Dade County Public Safety Department Perrine Substation received a call that there had been "shots fired in the area" at 19955 S.W. 248th Street. At 7:33 P.M., a patrol car unit was dispatched with one back-up unit. At 7:46 P.M. these two units responding to the call arrived on the scene.

As reflected by plaintiff's exhibit 1A, 19955 S.W. 248th Street, Dade County, Florida, is a rural farm area. The subject property consists of a house approximately 150 Feet from the road and a single story barn approximately 300-400 Feet from the rear of the house. The barn is approximately 50 Ft. in width and 500 Ft. in length.

Officers Charter and Dwyer were the two units who were dispatched to answer the call at 7:33 P.M. Officer Dwyer was the backup unit. Prior to either officer reaching the scene of the alleged shots, they were met by an unidentified white female in a light colored Cadillac who communicated with Officer Dwyer that one of the participants in the alleged shooting was parked on the corner of 199th Avenue and 244th Street. Both officers proceeded to this area. Both officers approached the defendant, Thomas Jones, who was seated in his automobile. Mr. Jones' automobile was parked approximately 200 yards from the rear of the subject barn. During the conversation with defendant, Thomas Jones, a 16 year old white male approached the officers and informed them that Thomas Jones did, in fact, reside at the scene and was, in fact, a participant in the "shots fired" as reported earlier. Thereafter, Officer Dwyer left the area with his unit and proceeded to 19955 S.W. 248th Street, where the house and barn are located. Officer Charter remained with defendant Jones, who was not yet under arrest.

Upon arriving at the scene, Officer Dwyer spoke with several more neighbors who informed him that they had observed three white males leave the barn, one entering his automobile and driving to the road in front of the house, the other two leaving the house at which time the shots were fired in the immediate area. After this information was related to Officer Dwyer, he approached the house and heard the telephone ring. On the front porch Officer Dwyer looked into the living room area through the front picture window and then entered the house, without knocking, through the partially opened door, and proceeded through the living room area into the kitchen where he answered the phone. Officer Dwyer

testified that he entered the house and subsequently the barn to look for injured persons or additional witnesses in connection with the shooting investigation. Officer Dwyer then looked around and saw no blood or injured people in the house.

Having found no one in the house, Officer Dwyer communicated with Officer Charter to proceed to the barn to search for injured people there. Officer Charter then arrived with defendant Jones in the rear cage portion of the car. Officer Charter testified that Jones had been arrested by this time for loitering and prowling because he could not explain his presence in the area. Officer Charter testified that the barn door was partially opened approximately 4 to 6 inches. The officers entered the barn equipped with flashlights and remained in the barn approximately 5 to 10 minutes. In the rear portion of the barn the officers came across what appeared to them to be some form of a "still". The officers then departed the barn, went back to the house at which time Officer Dwyer telephonically communicated with the Perrine Substation for them to dispatch the duty Lieutenant to proceed to the scene. Lt. Lyons arrived at the scene at approximately 8:30 P.M. and spoke with both Officers Dwyer and Charter. Subsequently, all three officers re-entered the barn and again viewed what the officers concluded was a possible illegal "still". The officers then departed the barn, re-entered the house at which time Lt. Lyons again telephonically communicated with the Perrine Substation and requested specifically that a Federal Treasury Agent, Agent Nowicki be telephoned and informed that an illegal still was being operated at the subject location. Agent Nowicki and Agent Harmon of the Bureau of Alcohol,

Tobacco and Firearms of the United States Treasury Department (hereinafter referred to as "ATF") arrived at approximately 10:00 P.M.

Treasury Agent Nowicki, after receiving the communication from the Perrine Substation, called Agent Harmon and requested that he accompany him to the location in the Southwest area of Dade County where the illegal "still" had been reported. Agent Nowicki readily admitted in his testimony that he attempted no communication whatsoever with any United States Attorney, Federal Judge or Magistrate at any time whatsoever on the evening of April 12, 1974.

Upon the arrival at approximately 10:00 P.M., Agent Nowicki testified that he read defendant Jones his rights and was handed a small wrench and knife purportedly taken from defendant, Thomas Jones upon his arrest by Officer Charter. Agent Nowicki purportedly observed a substance "mash" on the wrench itself and requested of defendant Jones to take his shoes off for possible evidence. Both Agents Nowicki and Harmon spoke with Lt. Lyons and Officers Charter and Dwyer as to their observations in the subject barn. The agents then proceeded to the barn, and viewed the still. From there they went to the house, following the electric wires from the still water pump. In the house they found several receipts from the Tropigas Company, a Georgia telephone book and some shoes, on the soles of which was mash. The gas receipts were in a closet in the hall by the electric panel where the wires terminated. The closet was open. The phone book was in a drawer which was partially open in a table and the shoes were on the floor in the bedroom.

The ATF agents then went outside the house and peeked into a truck camper parked on the lawn. In the truck they observed cardboard cartons similar to the ones they saw beside the still. These cartons were labeled "Reliance Products Ltd., Winnipeg, Canada." The truck was seized and the glove compartment was searched. An auto repair bill was found therein. The interior of the rear of the truck camper smelled of whisky. This occurred about 11:00 P.M.

The ATF agents then went to the car in which Jones was found. They saw in it items similar to those they saw by the still. They searched and seized it. In it they found a hydrometer.

All of the state and federal agents who testified at the hearing readily admitted that absolutely no attempt whatsoever was made to obtain any arrest or search warrants. In their view, none were required due to the exigent circumstances. Therefore, unless the Court finds that the searches were not justified and thus grants the motion to suppress, the Government will introduce at trial the following items from these searches and seizures:

1. The driver's license, wrench and shoes found on Thomas Jones.

2. Pictures and testimony about the still and related paraphernalia from the area of the barn.

3. The receipts, phone book and shoes from the house.

4. The cartons and receipt from the truck camper in the yard.

5. The hydrometer found in the car in which Jones was arrested.

Two searches were conducted in this case, the first by county police, and the second by federal ATF agents. In order to be upheld, both searches must be valid.

Defendant Thomas Jones was placed under arrest by the county police officers at about 8:15 P.M. on April 12, 1974 for loitering and prowling. However, the search of the house and barn by the state officers can not be considered as incident to a legal arrest for the following reasons: 1) Officer Dwyer had already entered and searched the house before Officer Charter placed Jones under arrest. 2) The officers entered the barn pursuant to their investigation of the shooting incident which had no relation to an arrest for loitering and prowling. Later in the evening an ATF agent placed Jones under arrest for the additional charge of possession of a switchblade knife. This arrest, however, occurred after both the house and barn had been searched by the county officers. 3) The county officers testified that both the loitering and prowling and possession charges against Jones were later dismissed for lack of prosecution and never refiled. This factor is some support for defendants' contention that the arrests themselves were not legal.

The Court finds, however, that the county officers' search was legal as based upon the exigent circumstance of looking for victims of a shooting incident. Being in a place where they had a right to be, the officers found the

still because it was in plain view. Witnesses had reported that they had heard shots fired and had seen three men running in the vicinity of the house and barn. Therefore it was logical and prudent for the officers to consider that there might be someone injured and in need of help in the house or the barn. The fact that no victims were actually found does not negate the real possibility that existed.

In Guzman v. Estelle, 493 F.2d 532, 537 (5th Cir. 1974), the court held that lack of time in which the search warrant could have been secured is an exigent circumstance that justifies a warrantless search. In this case, it would be senseless to expect police officers to obtain a warrant before answering the dispatch call, or, once on the scene, before entering the buildings. Clearly, in matters involving possible injury by gun shot, time is of the essence.

Once legally inside the barn, the still was in plain view. In Coolidge v. New Hampshire, 403 U.S. 443, 465, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1970), Justice Stewart held that where the initial intrusion that brings the police within plain view of an article is supported not by a warrant but by one of recognized exceptions to the warrant requirement, the seizure is legitimate. He stated that the plain view doctrine may be applied where an officer is not searching for evidence against the accused, but inadvertently comes across an incriminating object. *Id.* at 466, 91 S.Ct. 2022. Where objects fall in the plain view of an officer who has a right to be in the position to have that view, they are subject to seizure and may be introduced in evidence. Harris v. United States, 390 U.S. 234, 236, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).

In this case the officers were searching for victims of a shooting incident. They entered the house and barn looking for victims, and inadvertently came across evidence of the operation of a still. No evidence was presented at the hearing to indicate that the officers' testimony of the reasons for their conduct should not be believed. Therefore the Court concludes that the search and seizure conducted by the county officers were legal.

The Court further finds that the search by the federal officers was also legal. The Court does not base its decision on the ground suggested by the government: that there was insufficient time for the ATF agents to obtain a warrant. In fact the evidence established that the ATF agents were called by the county officers at about 9:00 P.M., and that the magistrate could be reached until about 11:00 P.M. and was located only fifteen or twenty miles away. Furthermore, Federal Agent Harmon testified that the stills each weighed about 2800 pounds, and that he was not afraid that someone would walk away with a still. As for smaller items in the house, the county police had surrounded the area. Therefore, no emergency existed concerning the speed with which the federal agents arrived on the scene.

The federal search was legal because it was based upon a legal search by the county officers. Crucial to this determination are the facts that the county police called the federal agents to the scene, and that the federal search was directly related to the object of the county search.

The Court bases its determination that the federal search was legal upon the direct precedent established

by Judge Dyer in United States v. Green, 474 F.2d 1385 (5th Cir. 1973), cert. denied, 414 U.S. 829, 94 S.Ct. 55, 38 L.Ed.2d 63 (1973). While Green was away, a fire broke out in his apartment. City firemen entered the apartment to put out the fire, and requested the Fire Chief to come to the premises to determine the cause of the fire. During his investigation the Fire Chief inadvertently discovered counterfeiting plates. The Fire Chief then called the Secret Service. In response to the call, a Secret Service agent went to Green's apartment, and the Fire Marshall handed him the plates he had discovered. At no time did either the city or federal authorities seek to obtain a warrant.

Judge Dyer held that it was not necessary for the secret service agent to have obtained a warrant before he entered the apartment even though there was plenty of time in which to do so. 474 F.2d at 1390. Judge Dyer explained that the purpose of the Fourth Amendment is to prevent unauthorized invasions of privacy. However, once that privacy is lawfully invaded, a subsequent search of the area already searched constitutes no additional invasion of privacy and therefore no violation of the Fourth Amendment. Judge Dyer's holding is directly applicable to the factual situation here:

> The purpose of a search warrant is to ensure judicial authorization, in advance, of intrusions into constitutionally protected privacy. Where a lawful intrusion has already occurred and a seizure by a State officer has validly taken place as a result of that intrusion, the invasion of privacy is not increased by an additional officer, albeit a federal officer, who is

> expert in identifying the type of contraband discovered, to enter the premises to confirm the belief of the State officer and to take custody of the evidence. Once the privacy of a dwelling has been lawfully invaded, to require a second officer from another law enforcement agency arriving on the scene of a valid seizure to secure a warrant before he enters the premises to confirm that the seized evidence is contraband and to take custody of it is just as senseless as requiring an officer to interrupt a lawful search to stop and procure a warrant for evidence he has already inadvertently found and seized.

474 F.2d at 1390.

The rationale which justifies the federal search is that the subsequent intrusion does not significantly increase a preexisting legitimate interference with a protected interest. United States v. Soriano, 482 F.2d 469, 476 (5th Cir. 1973). Thus the determination that the subsequent search does not significantly add to the invasion of privacy caused by the initial search is crucial. As pointed out in *Soriano*, this requirement is met if the successive intrusions are close in time, practically identical in nature and analytically and factually separable only because made by two different sovereigns. 482 F.2d at 476 n.13. The Court finds that all of these criteria were present in this case.

In United States v. Carney, 356 F.Supp. 855, 858 n.1 (M.D.Tenn. 1973), the court distinguished its facts from *Green* in that in *Green* the secret service agent entered "subsequent to and pursuant to" the discovery of the Fire Marshall. The rationale is that independent

searches constitute separate and additional invasions of privacy. However, here as well as in *Green*, the federal authorities entered the premises pursuant to a call by the local authorities, and the search conducted by the federal agents was directly related to the objects discovered by the county oficers. Therefore, based upon the authority of United States v. Green, United States v. Soriano, and United States v. Carney, the Court concludes that the search and seizure conducted by the federal officers were legal.

The Court has considered all of the evidence presented at the evidentiary hearing, and has studied all of the submissions filed by the parties. For the foregoing reasons, the Court concludes that the searches of both the county and federal officers were legal, and therefore the motion to suppress the evidence seized therefrom is hereby denied.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 1979, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Solicitor General, Department of Justice, Washington, D.C., 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

By:_____

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